

The Honorable James L. Robart

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LYNN NUNNALLY,)
Plaintiff,) No. C07-1323JLR
v.) DEFENDANT'S MOTION FOR
XO COMMUNICATIONS, a Delaware) SUMMARY JUDGMENT
Corporation; ABC CORPORATION and JOHN)
DOES 1-10,)
Defendants.) Note on Motion Calendar:
) December 12, 2008
) Oral Argument Requested

I. INTRODUCTION AND STATEMENT OF RELIEF REQUESTED

Defendant XO Communications seeks summary dismissal of Plaintiff Lynn Nunnally's claim for constructive discharge in violation of public policy.¹ Nunnally resigned from XO approximately eleven months after calling XO's Ethics Hotline. She complained to the Hotline that, in a few instances, XO's local sales representatives were counting orders as complete before meeting all the technical requirements for booking them. The essence of Nunnally's claim is that her co-workers learned that she called the Hotline and then treated her differently and made her working conditions so intolerable that she was forced to resign. While XO believes that Nunnally's complaint to the Hotline involved matters too minor to establish the

¹ XO believes that Plaintiff's second claim for unpaid wages will be dismissed by the time of the summary judgment hearing by agreement of the parties.

MOTION FOR SUMMARY JUDGMENT - 1

DWT 12055944v2 0060350-000020

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1 “public policy” element of her claim, the simpler reason to grant this Motion is that the petty
 2 slights from co-workers upon which Nunnally bases her claim cannot amount to constructive
 3 discharge.

4 After Nunnally’s Hotline complaint, her base pay, benefits, job function, supervisor,
 5 work location and other basic terms all remained the same or improved. Nunnally admits that
 6 no one at XO ever asked her or told her to quit, or told her that she was going to be fired. To
 7 support her constructive discharge claim, Nunnally alleges incidents such as a co-worker being
 8 “snippy” to her, another not offering her a muffin, and other incidents of a similar nature. She
 9 also focuses on a verbal counseling she received five months after her complaint and six
 10 months before she resigned asking her to notify her supervisor if she was going to miss
 11 scheduled meetings. XO told Nunnally this mild counseling would not even go in her
 12 personnel file. For the next six months, Nunnally received no disciplinary action or other
 13 performance counseling. On these unremarkable facts, Nunnally cannot show that XO
 14 orchestrated a campaign to force her to quit, and her constructive discharge claim fails.

15 In addition, Nunnally fails to properly state a claim for wrongful termination in
 16 violation of public policy. Her claim is an improper appeal of her prior administrative
 17 Sarbanes-Oxley whistleblower retaliation complaint. That statute establishes the exclusive
 18 remedy for her retaliation complaint. The Department of Labor/OSHA investigated her
 19 complaint and found no basis for her claims. She failed to timely object to the Department of
 20 Labor’s findings, foreclosing any other action. She cannot now overcome her abandonment of
 21 that process by re-casting the retaliation allegations as a tort claim of wrongful discharge.

22 For all these reasons, XO respectfully requests summary dismissal of this claim.

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MOTION FOR SUMMARY JUDGMENT - 2

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II. STATEMENT OF FACTS

A. The Parties

1. XO Communications

XO is a publicly-traded nationwide provider of voice and data telecommunication services to businesses. Declaration of Charles Wilcox (“Wilcox Decl.”), ¶ 2. In the first quarter of 2005, XO’s revenues were approximately \$361 million. *Id.* XO does business in more than 75 major metropolitan markets. *Id.* XO maintains an office in Seattle focused on sales and technical support in this region. *Id.* The Seattle office does not prepare any quarterly or annual financial statements or other financial information that is disclosed to the SEC, investors, or shareholders. *Id.* XO’s financial reporting and SEC filing statements are performed at its corporate headquarters in Reston, Virginia. *Id.*

2. Plaintiff Lynn Nunnally

XO (then known as Nextlink Communications, Inc.) hired Nunnally in May 2000 as a Technical Sales Consultant. She was promoted to the position of Senior Sales Engineer in 2004. Declaration of Kelly Benton (“Benton Decl.”), ¶ 2; Nunnally Dep., 85:11-86:1; the excerpts from plaintiff’s deposition are attached to the Declaration of G. Hendershott (“Hendershott Decl.”) as **Exhibit A**. Regardless of title, Nunnally’s “Sales Engineer” duties remained relatively constant throughout her employment. Nunnally Dep., 75:4-16. Her duties included assisting the sales representatives to make sales, reviewing orders to be sure they were technically feasible to install for the customer, and making sure contracts and other documents were signed before “approving” the order so it could be “booked” at the local level. Benton Decl., ¶ 2. In essence, her role was to “scrub” every order to make sure that it was accurate and would be trouble-free.

Nunnally has no education beyond high school, no training in accounting standards, and she is unfamiliar with the laws that regulate the reporting of sales and/or revenue orders. Nunnally Dep., 89:14-20; 112:15-22; 120:1-19. Nunnally (and her co-workers) never prepared

1 any financial statements, SEC filings, or shareholder communications for XO. Nunnally Dep.,
 2 77:14-79:14. Nunnally was never a salesperson and was unfamiliar with the XO compensation
 3 plan for salespersons. Benton Decl., ¶ 3; Nunnally Dep. 306:7-15.

4 **B. Nunnally Complained to XO's Ethics Hotline in February 2005**

5 On February 16, 2005, Nunnally complained to XO's in-house counsel in Seattle and
 6 then to XO's Ethics Officer (Charles Wilcox) that approximately four sales orders had been
 7 processed outside of XO's regular procedures (i.e. sales representatives were attempting to
 8 "push through" orders for end-of-month booking before meeting the technical requirements).
 9 Wilcox Decl., ¶ 3; Nunnally Dep., 190:15-24. The sales orders involved small amounts of
 10 revenue (less than \$13,000 per month) that had no material impact on XO's financial reporting
 11 to shareholders. *Id.* Nunnally asserted her complaint shortly after one of Nunnally's co-
 12 workers raised concerns about her job performance. Nunnally Dep., 146:12-148:17.

13 **1. XO Promptly Investigated Nunnally's Complaint**

14 In response to Nunnally's call to the Hotline, XO, through its outside legal counsel,
 15 hired a third party, Protiviti, to investigate her allegations. Wilcox Decl., ¶ 4. Protiviti
 16 reviewed order documentation and e-mails and interviewed over a dozen employees. *Id.* In
 17 March 2005, Protiviti issued its findings. The report itself is a privileged work product. *Id.*

18 While the complete results of the investigation were privileged, XO advised Nunnally
 19 that the investigation had been completed and thanked her for bringing the issues forward.
 20 Wilcox Decl. ¶ 5. Wilcox also summarized the results of the investigation to the Seattle Branch
 21 Manager. Wilcox Decl. ¶ 6. The investigation did not result in any changes in reporting sales
 22 to shareholders or the public. Nor did it result in any changes to XO's prior accounting of
 23 sales. *Id.* No employees were disciplined for the sales that Nunnally described in her
 24 complaint to the Hotline. *Id.* The total amounts of transactions at issue were minor in relation
 25 to XO's revenue. *Id.* XO received no other allegations of improper order processing from any
 26 other employee. *Id.*

27 MOTION FOR SUMMARY JUDGMENT - 4

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1 **C. Nunnally Complained of Retaliation by Co-Workers**

2 At the end of March 2005, Nunnally complained that she was being retaliated against
 3 by her coworkers for calling the Ethics Hotline.² Benton Decl., ¶ 4 and Exhibit 1 thereto.
 4 Nunnally complained that: (1) one of the Sales Managers and the Account Executives on her
 5 team were being “snippy” to her; (2) certain Account Executives did not seek assistance from
 6 her, but instead sought assistance from one of Nunnally’s co-workers (Andrea Told), despite
 7 the fact that Nunnally was formally assigned to help; and (3) Angela Thomas (a/k/a Angela
 8 Bender) had removed a file from Nunnally’s desk and responded in a curt way when Nunnally
 9 confronted her. *Id.* Nunnally also complained that an Account Executive offered other
 10 employees a bagel but did not offer her one. *Id.*; Nunnally Dep., 154:1-15. Nunnally also
 11 believed that she was retaliated against when she was not offered a muffin by another co-
 12 worker. Nunnally Dep., 151:24-152:25.

13 Following interviews with the Seattle office employees, XO’s Human Resources
 14 Representative determined that the other employees Nunnally identified in her complaint did
 15 not know that Nunnally had filed the original complaint. XO concluded that there was no
 16 retaliation against Nunnally. Benton Decl., ¶ 5 and summary of investigation dated April 25,
 17 2005, attached as Exhibit 2 thereto. Nunnally admitted that she did not know if other XO
 18 employees knew the source of the investigation or how the investigation took place. Nunnally
 19 Dep., 157:15-20; 170:5-13; 172:8-13.

20 After her allegations of retaliation were investigated, Nunnally continued working at her
 21 position and continued to receive positive performance reviews. Benton Decl., ¶ 6 and Exhibit
 22 3 thereto. At one point, XO moved the location of several sales engineers, including Nunnally,
 23 closer to other employees with whom they worked in July 2005. Benton Decl., ¶ 7 and Exhibit
 24 4 thereto. Nunnally promptly objected, and she returned to a location she preferred. *Id.* On

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² Neither the Protiviti investigators nor XO’s Ethics Officer told Nunnally’s co-workers that Nunnally
 26 called the Hotline. Subsequent internal investigators responding to Nunnally’s retaliation complaints
 27 concluded that the co-workers she complained about at the time did not know who called the Hotline.

1 July 22, 2005, Nunnally's supervisor gave her a verbal warning for missing meetings without
 2 notifying her supervisor and other minor issues. Benton Decl., ¶ 8; a copy of a written
 3 summary of the verbal warning is attached as Exhibit 5 thereto. The verbal warning was not
 4 made part of Nunnally's personnel file, and no further discipline followed. Benton Decl., ¶ 9.

5 **D. Sarbanes-Oxley Whistleblower Complaint**

6 On July 28, 2005, Nunnally filed a whistleblower complaint with OSHA, once again
 7 stating that she believed she had been retaliated against for filing her initial complaint with
 8 XO's Ethics Hotline. Benton Decl., ¶ 10; a copy of the complaint is attached as Exhibit 6
 9 thereto. Nunnally's complaint was based on the employee protection provisions of Title VIII
 10 of the Sarbanes-Oxley Act of 2002 (referred to herein as "Sarbanes-Oxley"). The U.S.
 11 Department of Labor has jurisdiction over Sarbanes-Oxley complaints, and OSHA investigates
 12 allegations made by whistleblowers under the Act. Her OSHA claim alleged retaliation based
 13 on the following: (1) a verbal warning issued to her on July 22; (2) unfriendly treatment by her
 14 co-worker, Angela Thomas (a/k/a Bender), and more subtle acts by other Account Executives,
 15 Albena Ingalsbe and Dylan Fraser; (3) re-assignment of certain Account Executives to Sales
 16 Engineers; and (4) the placement of Nunnally's cubicle near her supervisor's office. OSHA
 17 investigated the matter and concluded that no retaliation had occurred, confirmed by its letter
 18 dated April 6, 2006 providing its preliminary findings and order. Benton Decl., ¶ 11; a copy of
 19 the OSHA determination letter is attached as Exhibit 7 thereto. *Id.* Nunnally did not appeal the
 20 decision, nor did she pursue civil litigation in the manner required under the Sarbanes-Oxley
 21 Act. Benton Decl., ¶ 12; Hendershott Decl., ¶ 3.

22 **E. Nunnally's Compensation and Other Fundamental Aspects of Her Position
 23 Were Not Reduced After She Called the Hotline**

24 Following her call to the Ethics Hotline and her OSHA complaint, Nunnally's
 25 compensation was not reduced, and her benefits remained the same. Benton Decl., ¶ 13. She
 26 remained Senior Sales Engineer and was never demoted. *Id;* *see also* Nunnally Dep., 75:3-16.
 27

1 Nunnally continued to receive generally positive performance reviews after she called the
 2 Ethics Hotline. Benton Decl., Exhibit 7. She received only one caution (in mid-July 2005) and
 3 never received any other disciplinary warning or caution of any kind. Nunnally admits that no
 4 one at XO ever told her that she was going to be terminated or that she should resign. Nunnally
 5 Dep., 205:17-206:6.

6 **F. Nunnally's Resignation**

7 On January 12, 2006, Nunnally resigned from XO to accept a position at Symetra
 8 Financial Corporation. Nunnally Dep., 26:2-9; 125:18-126:6; Benton Decl., ¶ 14.

9 **III. EVIDENCE RELIED UPON**

10 XO relies upon the Declarations of Charles Wilcox, Kelly Benton, and Gregory
 11 Hendershott, and the exhibits thereto submitted herewith, along with the pleadings and records
 12 on file in this action.

13 **IV. AUTHORITY AND ARGUMENT**

14 Nunnally claims that XO wrongfully constructively discharged her in violation of
 15 public policy. Complaint ¶¶3.1 – 3.8. She alleges that XO forced her to resign in retaliation for
 16 engaging in protected activity, namely her internal complaint to the Ethics Hotline and her
 17 complaint to OSHA. *Id.* She claims that her complaints were protected under the
 18 whistleblower provisions of the Sarbanes-Oxley Act, 18 USC 1514A. *Id.* at ¶¶3.2 – 3.4.
 19 Nunnally's claim must be dismissed because either: (1) she cannot demonstrate that conditions
 20 were so intolerable that they rise to the level of a constructive discharge; (2) she cannot
 21 establish the other elements of a wrongful termination claim; or (3) she cannot pursue a
 22 common law public policy claim because she failed to pursue her claim through the established
 23 and exclusive remedy created by Sarbanes-Oxley.
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 27 **MOTION FOR SUMMARY JUDGMENT - 7**

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1 **A. Nunnally's Claim Fails Because She Cannot Show XO Made Conditions so**
Intolerable That She Was Forced to Resign

2 Nunnally's claim for termination in violation of public policy should be dismissed
3 because she cannot establish a constructive discharge.³ Plaintiff resigned to take another job,
4 and the workplace slights she alleges do not create the intolerable conditions necessary for the
5 tort she asserts. To prevail, she must prove that she was forced to quit or her working
6 conditions became unbearable (to a reasonable person).

7 Nunnally resigned from her position at XO to take another position at Symetra
8 Financial Group. Nunnally Dep., 26:2-9; 125:18-126:6. Resignations are presumed to be
9 voluntary. *Barrett v. Weyerhaeuser Co. Severance Pay Plan*, 40 Wn. App. 630, 638, 700 P.2d
10 338, 343 (1985) ("A voluntary resignation occurs when an employee abandons the employment
11 because of a desire to leave, including such a desire motivated by a dissatisfaction with
12 working conditions."); *Sneed v. Barna*, 80 Wn. App. 843, 849, 912 P.2d 1035, 1038 (1996) ("a
13 resignation is presumed to be voluntary, and it is incumbent upon the employee to introduce
14 evidence to rebut that presumption").

15 To sustain a constructive discharge claim, a plaintiff must introduce evidence that an
16 employer made working conditions "**intolerable**" and thereby **forced** an employee to quit.
17 *Martini v. Boeing Co.*, 137 Wn.2d 357, 366 n.3 (1999); *Barrett v. Weyerhaeuser Co. Severance*
18 *Pay Plan*, 40 Wn.App. 630, 631-32 (1985).⁴ The test for constructive discharge is "whether
19 working conditions would have been so difficult or unpleasant that a reasonable person in the
20 employee's shoes would have been compelled to resign." *Sneed v. Barna*, 80 Wn. App. 843,
21 849 (1996). An employee must prove either "aggravating circumstances" or a "continuous
22 pattern of discriminatory treatment." *Id* at 850.

23

24

25 ³ The summary judgment standard is well known and will not be recited here.

26 ⁴ Washington state law applies to plaintiff's constructive discharge claim because she does not base her
claim on a federal antidiscrimination statute. *Wallace v. City of San Diego*, 479 F.3d 616, n.3 (9th Cir.
2007).

1 Frustration or dissatisfaction with an employee's job alone cannot sustain a claim of
 2 constructive discharge. Summary judgment is appropriate if an employee cannot show extreme
 3 and pervasive conduct by the employer:

4 We hold as a matter of law that these allegations do not
 5 evidence the "aggravating circumstances" or "continuous pattern
 6 of discriminatory treatment" required to support a constructive
 7 discharge claim. Sneed received the same pay as she did when a
 8 principal; worked as Administrator for a relatively short period of
 9 time; and was asked to help register students on opening day,
 which by her own admission was not an unprecedented request.
 The other allegations, while evidencing some degree of
 frustration, do not rise to the level of being so difficult or
 unpleasant that a reasonable person in Sneed's shoes would have
 felt compelled to resign. Sneed's argument fails.

10 *Sneed v. Barna*, 80 Wn. App. 843, 849 (1996).

11 First, Nunnally cannot identify any extreme or aggravated circumstances related to her
 12 employment or any pattern of discrimination. The specific instances of improper conduct do
 13 not rise to constructive discharge. At most, many of Nunnally's complaints reflect unfriendly
 14 or indifferent treatment by her co-workers. The failure to offer her a muffin and a bagel cannot
 15 establish an extreme or hostile environment. Nunnally Dep., 151:1-152:25. One incident of a
 16 co-worker raising her voice does not demonstrate any pattern. Nunnally Dep., 164:21-166:1.
 17 In fact, none of Nunnally's supervisors yelled at her or otherwise threatened or intimidated her.
 18 Nunnally Dep., 166:16-22. Nunnally's allegation that she was moved closer to supervisors to
 19 harass her also fails for several reasons, including that she admits that she was quickly moved
 20 back to her original location. Nunnally Dep., 226:1-228:10. In fact, none of her allegations
 21 reflect extreme conditions that would force her to leave the job. Following one minor verbal
 22 counseling, Nunnally received no further counseling or discipline for the final six months of
 23 employment. Benton Decl., ¶ 13.

24 Second, Nunnally fails to show any link between any alleged hostile conduct and her
 25 eventual resignation in January 2006. Nunnally identified perceived slights and "snippy"
 26 comments in the spring of 2005 and other problems (cubicle move and reassignment) again in
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MOTION FOR SUMMARY JUDGMENT - 9

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1 July 2005 (complaint to OSHA). Benton Decl., Exhibits 2, 4 and 6. Significantly, however,
 2 Nunnally identified no alleged intolerable conduct between July 2005 and her resignation in
 3 January 2006. Nunnally Dep., 220:1-14. All of the incidents of alleged hostile or unfavorable
 4 treatment occurred prior to the end of July 2005, when she filed her OSHA complaint.

5 Nunnally must establish that conditions were intolerable or that she was forced to
 6 resign. However, Nunnally's continued employment at XO from July 2005 for another seven
 7 months undermines her claim that conditions at XO were intolerable. Nothing changed in the
 8 last months of 2005 or January 2006 that reflects a deteriorating or impossible working
 9 situation. Nunnally Dep., 220:1-14. There was no demotion, performance plan, poor
 10 evaluation, threat, shout, unreasonable demand, or offensive conduct that triggered Nunnally's
 11 resignation. The alleged wrongful conduct that Nunnally identified took place between March
 12 and July 2005 (even the earlier 2005 acts do not amount to constructive discharge). She
 13 continued working without incident for (at least) six more months. When considering
 14 constructive discharge under federal statutes, the Ninth Circuit has held that continuing to work
 15 for five months after alleged discrimination or retaliation precludes a finding of constructive
 16 discharge. *See e.g., Poland v. Chertoff*, 494 F.3d 1174, 1185 (9th Cir. 2007) (employee
 17 continuing to work for five months after a transfer to a new position was a key factor in court
 18 deciding that no constructive discharge occurred); *Hardage v. CBS*, 427 F.3d 1177, 1184-85
 19 (9th Cir. 2005) (five month delay in employee's resignation after alleged sexual harassment
 20 defeats constructive discharge claim). In short, the court can find as a matter of law that a
 21 reasonable person would not have found the working conditions so intolerable as to compel a
 22 resignation.

23 **B. Nunnally Cannot Demonstrate the Basic Elements of a Wrongful Discharge
 24 in Violation of Public Policy Claim.**

25 Even if Nunnally could establish constructive discharge (which she cannot), her public
 26 policy termination claim still fails. Washington law governs a claim for wrongful discharge in
 27

1 violation of public policy. *Rains v. Criterion Systems, Inc.*, 80 F.3d 339, 343 (9th Cir. 1996). It
 2 is well established that an at-will employee can be terminated for any reason “absent a contract
 3 or narrow exception where the discharge violates a clear mandate of public policy.” *Domingo*
 4 *v. Boeing Employees Credit Union*, 124 Wn. App. 71, 85, 98 P.3d 1222, 1229 (2004). The
 5 cases addressing the claim generally involve situations where employees are fired for refusing
 6 to commit an illegal act, for performing a public duty, for exercising a legal right or privilege or
 7 for engaging in actual whistleblowing activity. *See, e.g., Ellis v. City of Seattle*, 142 Wn.2d
 8 450, 461, 13 P.3d 1065, 1071 (2000) (public policy implicated where employee was fired for
 9 refusing to bypass a fire alarm); *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 944-945,
 10 913 P.2d 377, 383-384 (1996) (public policy violated when an employee who broke company
 11 rule to save a woman’s life was discharged). The instant action does not arise from any of
 12 these types of situations.

13 The public policy claim must be supported by evidence of (1) a clear public policy; (2)
 14 that discouraging plaintiff’s conduct would jeopardize the public policy (the “jeopardy”
 15 element); (3) public policy-linked conduct caused the dismissal (the “causation” element) and
 16 (4) an absence of justification from the employer. *Korslund v. DynCorp Tri-Cities Services,*
 17 *Inc.*, 156 Wn.2d 168, 178, 125 P.3d 119, 125 (2005); *Fosmo v. State Dept. of Personnel*, 114
 18 Wn.App. 537, 540-541, 59 P.3d 105, 107 (2002). Washington courts have “interpreted the
 19 cause of action narrowly.” *Reninger v. State Dept. of Corrections*, 134 Wn.2d 437, 446, 951
 20 P.2d 782, 787 (1998). Plaintiff’s claim fails to meet that narrow exception to the employment-
 21 at-will doctrine because plaintiff (1) failed to pursue other available remedies and (2) there is
 22 no nexus between her resignation and her internal call to the Ethics Hotline or OSHA
 23 complaint. Moreover, Nunnally’s complaints about the sales representatives with whom she
 24 worked involved very minor amounts of money that did not implicate shareholder or
 25 accounting fraud concerns (approximately \$37,000 in sales out of \$361 million total sales in
 26 the relevant quarter) that might support a public policy.

27 MOTION FOR SUMMARY JUDGMENT - 11

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1 **1. The Public Policy Tort Claim Must Be Dismissed Because Plaintiff
2 Had Other Available Remedies for Her Retaliation Claim.**

3 Washington courts consistently hold that where, as here, other remedies are available to
4 address the alleged public policy violation, the plaintiff cannot demonstrate the “jeopardy
5 element” (that discouraging the plaintiff’s conduct would jeopardize the public policy) of the
6 prima facie case. In those instances, the public policy claim is dismissed. *Korslund v. DynCorp*
7 *Tri-Cities Services, Inc.*, 156 Wn.2d 168, 182-183, 125 P.3d 119, 126-127 (2005); *Hubbard v.*
8 *Spokane County*, 146 Wn.2d 699, 713, 50 P.3d 602, 609 (2002) (same); *Gardner*, 128 Wn.2d at
9 945, 913 P.2d at 384 (same).

10 Where other remedies, including federal remedies, exist, courts will not extend the tort
11 of wrongful discharge in violation of public policy:

12 Here, however, the question is not whether the legislature
13 intended to foreclose a tort claim, but whether other means of
14 protecting the public policy are adequate so that recognition of a
15 tort claim in these circumstances is unnecessary to protect the
16 public interest . . . We conclude that the remedies under the ERA
17 are adequate to protect the public policy on which the plaintiffs
18 rely. Therefore, as a matter of law, Korslund’s and Miller’s
19 claims of wrongful discharge in violation of public policy fail.

20 *Korslund*, 156 Wn.2d at 183 (remedies under federal Energy Reorganization Act sufficient to
21 protect public interest; plaintiff’s claims of wrongful discharge in violation of public policy
22 rejected); *Plemons v. U.S. Bancorp*, 2006 WL 290557 at *5-6 (W.D. Wash. February 7, 2006)
23 (remedies under federal Truth in Lending Act sufficient to protect public interest; plaintiff’s
24 claims of wrongful discharge in violation of public policy rejected).

25 Here, plaintiff could, and did, file a charge of retaliation under Sarbanes-Oxley. In
26 response to a retaliation claim under Sarbanes-Oxley, the Department of Labor (through
27 OSHA) investigates the charge. If a party disagrees with the OSHA findings and order, an
28 appeal can be made to an Administrative Law Judge and then to a Department of Labor Review
29 Board. *See* 29 C.F.R. § 1980.110, 112. A party can also seek redress under Sarbanes-Oxley by
30 filing a civil suit only if OSHA does not conclude its investigation within 180 days. *See* 18

1 U.S.C.A. § 1514A, (b)(1)(B). This procedure provides a remedy “adequate to protect the
 2 public policy on which [Nunnally relies.]” (quoting *Korslund*, 156 Wn. 2d at 183) As a result,
 3 the tort of wrongful discharge in violation of public policy is unnecessary to protect that public
 4 policy, and the claim must fail.

5 Recently, a Wisconsin court faced the same issue and rejected a public policy tort claim
 6 under Wisconsin law, which is materially identical to Washington law in this area. *Repetti v.*
 7 *Sysco Co.*, 300 Wis.2d 568, 577, 730 N.W.2d 189, 193 (Wis. 2007) (plaintiff’s state law claim
 8 for wrongful discharge in violation of public policy failed because plaintiff “could have availed
 9 himself of the Sarbanes-Oxley protections and relief, but chose not to do so.”) The court
 10 analyzed the elements of Wisconsin’s tort claim of wrongful discharge (which are virtually
 11 identical to Washington law) and concluded that the tort claim could not be a substitute for the
 12 statutorily created remedy under the Sarbanes-Oxley Act.

13 The same rationale is even more important in the present case because Nunnally availed
 14 herself of the Sarbanes-Oxley process (while the plaintiff in the *Repetti* matter had not done
 15 so). Now she seeks the proverbial second bite at the same apple. Here, OSHA investigated and
 16 dismissed Nunnally’s whistleblower retaliation charge. Benton Decl., Exhibit 7. Nunnally
 17 never appealed the OSHA decision nor filed a civil lawsuit to pursue her Sarbanes Oxley
 18 retaliation claim. Any public policy concern raised by Nunnally has been fully investigated
 19 (and dismissed). Nunnally should not be allowed to resuscitate her failed claims by recasting
 20 them as a common law tort.

21 **2. Nunnally Fails to Demonstrate the Her Protected Activity Caused
 22 any Adverse Action.**

23 Nunnally fails to meet the causation element necessary to maintain her claim. Here,
 24 there is simply no nexus between any public policy concern and plaintiff’s decision to find a
 25 new job. There is no evidence that Nunnally’s internal call to the Ethics Hotline triggered any
 26 material adverse consequences. Although she maintains her subjective belief that others treated
 27

1 her differently and, for example, did not offer her bagels or muffins nearly a year before she
 2 resigned, she cannot provide evidence that others' actions were motivated by retaliation.
 3 Furthermore, she identifies no incidents of possible retaliation after she filed her complaint with
 4 OSHA, covering the entire last five months of her employment. Thus, she cannot meet the
 5 basic causation element of a wrongful termination claim.

6 **C. Nunnally's Failed to Timely Appeal her OSHA Retaliation Claim**

7 Alternatively, Nunnally's wrongful discharge claim should be dismissed because her
 8 state law claim constitutes an untimely appeal of the 2006 dismissal of her OSHA claims.
 9 Nunnally fails to state a claim upon which relief can be granted because she is improperly
 10 appealing the April 2006 Department of Labor/OSHA decision and cannot now bring a stale
 11 claim for retaliation under Sarbanes-Oxley.

12 Sarbanes-Oxley allows an aggrieved party to assert a retaliation claim by either (1)
 13 filing an administrative complaint with the Department of Labor; or (2) initiating a lawsuit in
 14 federal court, but only if the Department of Labor has not issued within 180 days of the
 15 administrative filing. 18 U.S.C 1514A(b)(1). The law requires that any such action "shall be
 16 commenced not later than 90 days after the date on which the violation occurs." 18 U.S.C.
 17 1514A(2)(D).

18 Consistent with her right under the law, Nunnally commenced an administrative
 19 proceeding with OSHA (the agency within the Department of Labor designated to investigate
 20 Sarbanes-Oxley claims) to seek remedies for retaliation in August 2005. Benton Decl., Exhibit
 21 6. Nunnally complained of a "hostile work environment specifically consisting of realigning
 22 your workgroup, changing the procedure for scheduling appointments as it applied to you,
 23 moving you to a different cubicle, hiring an additional sales engineer that made you fear for
 24 your job, and 'rifling' through your desk." Benton Decl., Exhibit 7.

1 OSHA conducted a formal administrative investigation. At the conclusion, OSHA
 2 issued its Findings and Order of Dismissal on April 6, 2006.⁵ *Id.* Once OSHA issued its
 3 preliminary order or findings, Nunnally was required to file any objections and request a
 4 hearing within 30 days of receipt of the findings and preliminary order. 29 C.F.R.
 5 §1980.106(a). The regulations are clear that when a party fails to file a timely objection, the
 6 findings or preliminary order “shall become the final decision of the Secretary, *not subject to*
 7 *judicial review.*” 29 C.F.R. 1980.106(b)(2) (Emphasis added). The Findings and Order clearly
 8 reinforced this point, stating “If no objections are filed, these Findings will become final *and*
 9 *not subject to court review.*” *Id* (Emphasis added). Nunnally did not appeal of the OSHA
 10 Order. The Order issued by the Department of Labor is now the final determination and is not
 11 subject to judicial review. 29 C.F.R. 1980.106(b)(2) The Department of Labor has taken a
 12 strong position against allowing subsequent suits involving the same parties and claims: “The
 13 Secretary believes that it would be a waste of the resources of the parties, the Department, and
 14 the courts for complainants to pursue duplicative claims.” Final Rule, 69 FR 52104, 2004 WL
 15 1876043, *19 (2004).

16 Because Nunnally did not properly appeal the OSHA determination, her rights under
 17 Sarbanes-Oxley have extinguished. Furthermore, any new action pursuant to the whistleblower
 18 protections of Sarbanes Oxley are time-barred. The statute requires all claims to be filed within
 19 90 days of the alleged retaliatory act. 18 U.S.C. 1514A(2)(D). Nunnally did not file this
 20 lawsuit until approximately 18 months after she left XO’s employment.

21 Nunnally now seeks to relitigate her failed and stale claims by asserting a common law
 22 wrongful discharge claim that rests squarely on the public policy created by Sarbanes-Oxley.
 23 Congress and the Department of Labor established a clear and extensive process to provide
 24 order and predictability to such claims. The court should not permit Nunnally to circumvent

25
 26 ⁵ Although OSHA’s investigation took slightly longer than six months, Nunnally did not file a lawsuit
 as she was permitted to do under the statute given the delay.
 27

1 the Department of Labor's appeals process and the applicable statute of limitations. This court
2 should dismiss her claim.

3 **V. CONCLUSION**

4 For the reasons above, XO requests that the Court summarily dismiss Nunnally's claim
5 for constructive discharge in violation of public policy.

6

7 DATED this 20th day of November, 2008.

8 Davis Wright Tremaine LLP
9 Attorney for XO Communications

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1 CERTIFICATE OF SERVICE

2 I hereby certify that on the date below stated, I electronically filed the foregoing with
3 the Clerk of the Court using the CM/ECF system which will send notification of such filing to
4 the following:

5 Jean Huffington
6 McKay Huffington & Tyler PLLC
7 14205 SE 36th Street, Suite 325
8 Bellevue, WA 98006-1505

9 DATED this 20th day of November, 2008.

10 /s/ *Amanda M. McFadden*

11 Amanda M. McFadden

12 MOTION FOR SUMMARY JUDGMENT - 17

13 DWT 12055944v2 0060350-000020

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